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No. 80-72

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Hon. F. RAY MARSHALL, Secretary of Labor of the United States, *et al.*,

Petitioners,

v.

The COUNTY OF LOS ANGELES, California, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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Number 80-72 presents what is in effect a cross-petition to review the judgment also presented for review in *County of Los Angeles* v. *Marshall,* No. 79-1965 (pet. for cert. filed June 14, 1980).

The Solicitor General, on behalf of the Secretary of Labor and other federal officials, seeks review of the rejection by the Court of Appeals of the jurisdictional defense of the Anti-Injunction Act, IRC §7421(a).[1] The Solicitor General, of course, must satisfy the requirements

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[1]Also involved is the co-extensive tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201.

implied in Rule 17, showing that the question is important and recurring.[2]

We agree that the question is important. It is our submission that the argument – implicit in the federal government's petition here – that hostage-taking statutory schemes such as the unemployment amendments at issue here will recur, constitutes the agreement of the federal parties that the petition on the constitutional merits in No. 79-1965 should be granted.

The most important and inconsistent fact which the Solicitor General's petition never faces up to is that while the FUTA, IRC § 3306(c)(7), exempts states and local governments from FUTA taxes, FUTA, IRC § 3309, then requires states and local governments to pay such amounts into the United States Treasury as will pay for unemployment compensation benefits to public sector employees at the same amount and under the same conditions and regulations as private sector employees receive, including "extended benefits", § 3304(a)(11) – with states and cities paying the entire cost of "extended benefits" for their employees and the federal government paying 50% of the cost of such extended benefits out of FUTA funds to private employees.

So in fact states and local governments are required by FUTA to pay more than private sector employers under the new FUTA scheme[3] of the amendments herein challenged.

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[2]As we point out in our petition for certiorari in No. 79-1965, Pet. 22, 34, there is no likelihood of a recurrence, or a division among the Courts of Appeals, under the unemployment law at issue here. Unless this Court grants certiorari in No. 79-1965 and declares the federal unemployment amendments unconstitutional, each state will have no effective choice but to conform to all future federal law requirements concerning unemployment benefits for public workers.

[3]Appendix A, *infra*.

The federal petitioners here seek to apply the Anti-Injunction and Declaratory Judgment Act provisions which apply only to federal taxes to the amount exacted from state and local tax-raised budgets by IRC § 3309 which applies only to states and local governments, but focus their petition upon the private sector tax credit scheme upheld in *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937). In this way they seek to avoid or conceal the coercive effect of the amendments and the federal FUTA tax taken out of state and local government tax budgets by the amendments of FUTA herein challenged. Petitioners admit these cost state and local governments at least $385 million per year with respondents' experts placing the amount at upwards of approximately $2 billion per year.

The petition also ignores the broad principles of Federalism which underlie *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) and says this is purely a Tenth Amendment case. The petition contends that when a state as a state is taxed under a federal statute, here FUTA, and must pay the taxes into the United States Treasury just as FUTA taxes are placed there from the private sector employers, this renders the amount thus taken not a tax so the doctrines of tax immunity, coercion under new facts involving a new statute not passed upon by *Steward,* discriminatorily forcing states to pay higher FUTA scheme costs than private sector employers by paying all the "extended benefit costs" of their former employees, must be overlooked in a case where respondents admittedly have a 1% unemployment rate for permanent employees and above all petitioner makes out no compelling national interest for overriding Federalism as for example in *Fry* v. *United States,* 421 U.S. 542 (1975).

The petitioner's reasons for not giving the amount from states and local governments exacted under the FUTA

amendments by applying that tax act to states and local governments is that it is clearly a federal tax and unconstitutional under *New York* v. *United States*, 326 U.S. 572 (1946), and *National League of Cities*, 426 U.S. at 843.

The "amount" is composed of state-local taxes raised by state-local governments, flowing as required by law into the federal treasury and then spent by the Congress under FUTA and the Social Security Act, 42 U.S.C. §§ 501 *et seq.* and 1101 *et seq.*

Petitioner's concentration upon the tax credit device of the private sector upheld in *Steward* and ignoring completely the tax on states and local governments is clearly prompted by the fact that this Court's jurisdiction to review and reverse such federal action has been asserted so often before and after *New York* v. *United States, supra.* Yet the entire purpose of Public Law No. 94-566 (1976) generally is to take an "amount" of tax funds from states and local governments in such sum as would pay in full the cost of public employee benefits under FUTA by linking it to the private sector scheme upheld in *Steward* and "unchanged"[4] from that day in 1935 when adopted until now. We submit that Public Law No. 94-566 is quite an enormous change as it imposes a tax upon states as states, and the extra charges for extended benefits, and involves facts and important intergovernmental constitutional power issues not before the *Steward* Court.

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[4]Petitioners rely upon *New Hampshire* v. *Marshall*, 616 F.2d 240 (1980), appeal pending, No. 79-1846, which repeatedly bases its decision upon the fact that the 1935 statute has been "unchanged" over the past 45 years. We submit the amendments here challenged as unconstitutional are indeed vast changes as well as changes effected by unconstitutional means.

The Solicitor General seeks by his petition to place the states in a position subordinate to private taxpayers. That, the federal Constitution does not do.

To bar consideration of the constitutionality of a tax exacted from states and local governments which is in effect, and certainly in result, a direct tax on state and local government tax revenues when in *Steward* a private taxpayer was held to have standing to raise the constitutionality of such a tax upon that private taxpayer is inconsistent with *Steward, New York* v. *United States, supra, National League of Cities* v. *Usery, supra,* and other cases holding states and their political units stand on a higher status than private taxpayers due to the higher status given to states under our constitutional Federalism, with over 100 references to the states as states in that Constitution as well as the Tenth Amendment.

The Solicitor General never faces up to this different status of the states in his petition which seeks to bar all court challenges to federal tax laws regardless of the facts as to the tax and the status of the parties involved.

1. Contrary to *Marbury* v. *Madison,* 1 Cranch. 137, 176-78 (1803), and progeny, the Solicitor General implies here that Congress, by successively enacting §§7421(a) and 3310 of the Internal Revenue Code, has divested this Court of jurisdiction to review the constitutionality, under *New York* v. *United States,* 326 U.S. 572 (1946) and *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), of federal legislation imposing a tax on state and local government personnel relations. The Solicitor General's assertion is unfounded. See *Lockerty* v. *Phillips,* 319 U.S. 182, 187 (1943).

The argument of the Solicitor General is that no court can review the constitutionality of a federal law require-

ment that federally tax-exempt entities tax themselves under state law, and pay tax into the federal treasury, unless these entities – here, state and local governments – refuse to accede to the federal requirement.

Then, the argument goes, a federal tax penalty,[5] exceeding the normal tax by 5 times, would accrue, but only against federal taxpayers. In that event, the Solicitor General argues, the private-sector employers on whom the penalty is imposed could follow the normal federal tax litigation paths. These private employers could assert vicariously the federalism-based rights of their state and local governments, in much the same way as was discredited in *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937), and *United States* v. *Darby,* 312 U.S. 100 (1941).[6]

On the record of this case, the several states would have to trigger a federal tax penalty of $11.5 billion on their private employers in order to litigate the constitutionality of the federally required public employer program.[7]

[5]In our view, a putative tax of 3.4% which has never been collected at a rate in excess of 0.7%, always since 1935 yielding a credit of 2.7%, consists of two components. The 0.7% actually, consistently and predictably received into the federal treasury is the normal tax. Denial of the federal tax credit would yield a 2.7% federal tax penalty.

[6]The exposure of private-sector employers to the federal tax penalty for the failure of government employers to pay state taxes would be the same under the jurisdictional alternative, recommended by the Solicitor General, of a petition under IRC §3310 to review an order of the Secretary of Labor decertifying a state's entire unemployment compensation law. See note 8, *infra.*

[7]When New Hampshire followed this suggestion, the federal government asserted different prudential and jurisdictional bars to avoid a decision on the constitutional merits. The majority of the panel of the Court of Appeals for the First Circuit rejected the assertion and decided the case on the merits. See Pet. App. 13a-14a, No. 79-1965; J.S.App. 6a-7a, No. 79-1846. Nonetheless, the Solicitor General has resurrected these defenses in seeking to avoid review by this Court in No. 79-1846, Motion to Dismiss 8 (Aug. 7, 1980).

This scenario — a state's exposing its private employers to a federal penalty in order to obtain a forum to litigate intergovernmental tax immunity — seems too harsh to induce belief that any state would refuse to conform to the federal requirement long enough to see the donouement. New Hampshire in the unemployment program at issue here was unable to see the game through to the end.[8] On the record of this case and of *New Hampshire,* No. 79-1846, there is no other remedy except through the jurisdiction which the District of Columbia Circuit Court found was present, notwithstanding IRC §7421(a). For, an alternate remedy must be practical and efficient, not merely available, if it is to foreclose review in other forums.[9]

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[8]See J.S. 19-20, No. 79-1846 (filed May 20, 1980). New Hampshire was coerced into attempting to settle its constitutional challenge to the federal unemployment law's public sector program requirements by the pattern of federal legislation. The Federal Unemployment Tax Act (FUTA) requires an annual certification by the Secretary of Labor that a particular state's unemployment law either does, or does not, meet each requirement set out in the FUTA and the other statutes incorporated by reference in the FUTA. IRC §3304(c). Certification is retroactive from October 31 to January 1. Federal law makes no provision for a prospective ruling from the Secretary; nor does federal law contemplate partially conforming state laws during the pendency of a challenge and review under IRC §3310. In the FUTA amendments at issue in both New Hampshire's appeal, No. 79-1846, and this case, No. 79-1965, the FUTA was amended to require changes in the private sector unemployment program of each state, as well as to require the enactment of a public sector unemployment program. In refusing to amend its law to conform to the public sector program requirements, New Hampshire necessarily also failed to conform to the private sector amendments (although New Hampshire makes no challenge to those private sector provisions either in this Court or in the Court of Appeals or before the Secretary below). This structural inhibition on any state's availing itself of the review provisions of IRC §3310 will be repeated each time Congress includes in the same amendments of the FUTA both public- and private-sector provisions.

[9]See, e.g., *Boyce's Executors* v. *Grundy,* 3 Pet. 210, 219 (1830).

The Solicitor General's argument that a jurisdictional alternative exists, when the record shows its practical unavailability, is an example of the sporting theory of constitutional adjudication. But, for the Solicitor General to seek review of the jurisdictional requirement that the sport be played, he must assert that there will be other federal requirements similar to the one whose merits is here for review.[10] That concession compels review on the merits in No. 79-1965.

2. The Solicitor General's petition in No. 80-72 is an admission that certiorari should be granted in No. 79-1965 in another sense as well. Ordinarily, federal jurisdiction would present a threshold question for this Court, even where, as here, the Court of Appeals below rejected the federal government's jurisdictional defense. However, under the Anti-Injunction Act — as the Solicitor General points out, Pet. for Cert. 6-7, No. 80-72 — the availability of an exception to the Anti-Injunction Act's bar cannot be determined without plenary consideration of the constitutional merits of the underlying challenge to the federal tax statute.[11] This is all the more true here where the federal statute imposes a tax on state and local governments. Moreover, a conclusion whether there is federal jurisdiction must therefore follow, rather than precede, resolution of the constitutional issue.

[10]We pointed out some pending, and possible, legislation using the hostage model in our petition, at pp. 33-35, in No. 79-1965.

[11]In asserting that the Anti-Injunction bars this action because the constitutional challenge lacks merit, the Solicitor General offers as his sole authority *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), and the companion case of *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495 (1937). Pet. for Cert. 7, No. 80-72. The Solicitor General thus joins issue on the constitutional merits as presented in No. 79-1965, see Pet. for Cert. 27, No. 79-1965, and admits the inseparable connection between jurisdiction and the constitutional merits.

3. Although the Anti-Injunction Act does not apply here because the federal taxing statute is unconstitutional,[12] if it were applicable, this case would present a conflict of decision with *Department of Employment* v. *United States,* 385 U.S. 355, 358 (1966), holding that the usual bar of the Johnson Tax Injunction Act, 28 U.S.C. §1341 (which, in restricting federal court injunctions against state tax collection, is the mirror-image of the Tax Anti-Injunction Act, IRC §7421(a), asserted here to bar federal court injunction of federal tax collection) would not apply to a suit challenging as unconstitutional a state unemployment payroll tax on a federal instrumentality.

CONCLUSION

The Solicitor General merely implied in his petition here that the hostage-taking scheme will recur, thus creating the possibility of future application of the Anti-Injunction Act against non-federal taxpayers subject to federally coerced state tax laws. The Court should defer a decision on certiorari in No. 80-72 pending an articulation by the Solicitor General how the application of the Anti-Injunction Act will recur.

In any event, the implication of its recurrence suggests that certiorari be granted in No.79-1965 to determine the

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[12] *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962).

constitutionality of the far-reaching intergovernmental power issues the amendments herein raise.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS ALLEGED TO IMPOSE DISCRIMINATORY TREATMENT ON CONFORMING STATE AND LOCAL GOVERNMENT EMPLOYERS

The provision of the Federal Unemployment Tax Act requiring, as a condition of the conformance of State law to federal law, adherence to the rules governing the extended benefits program is, in the Internal Revenue Code:

> Sec. 3304. APPROVAL OF STATE LAWS
>
> (a) Requirements. – The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that –
>
> * * *
>
> (11) extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970.

The provisions of the Federal-State Extended Unemployment Compensation Act of 1970, Pub.L.No. 91-373, Title II (Extended Compensation Act), codified at 26 U.S.C. §3304 note, establishing the requirements that state and local government employees be paid extended benefits, and the maximum amount of payment, are:

> Sec. 202. (a)(1) For purposes of section 3304(a)(11) of the Internal Revenue Code of 1954, a State law shall provide that payment of extended compensation shall be made, for any week of unemployment which begins in the individual's eligibility period, to individuals who have exhausted all rights to regular compensation under the State's law and who have no rights

to regular compensation with respect to such week under such law or any other State unemployment compensation law or to compensation under any other Federal law and are not receiving compensation with respect to such week under the unemployment compensation law of Canada. For purposes of the preceding sentence, an individual shall have exhausted his rights to regular compensation under a State law (A) when no payments of regular compensation can be made under such law because such individual has received all regular compensation available to him based on employment or wages during his base period, or (B) when his rights to such compensation have terminated by reason of the expiration of the benefit year with respect to which such rights existed.

* * *

(b)(1) The State law shall provide that the state will establish, for each eligible individual who files an application therefor, an extended compensation account with respect to such individual's benefit year. The amount established in such account should not be less than whichever of the following is the least:

(A) 50 per centum of the total amount of regular compensation (including dependents' allowances) payable to him during such benefit year under such law,

(B) thirteen times his average weekly benefit amount, or

(C) thirty-nine times his average weekly benefit amount, reduced by the regular com-

pensation paid (or deemed paid) to him during such benefit year under such law;

except that the amount so determined shall (if the State law so provides) be reduced by the aggregate amount of additional compensation paid (or deemed paid) to him under such law for prior weeks of unemployment in such benefit year which did not begin in an extended benefit period.

(2) For purposes of paragraph (1), an individual's weekly benefit amount for a week is the amount of regular compensation (including dependents' allowances) under the State law payable to such individual for such week for total unemployment.

The provisions of the Extended Compensation Act providing 50% federal funding for extended benefits in the private sector program, but denying this federal funding for employees of state and local governments (thus effectively requiring conforming state laws to tax governments more severely than private employers) are:

Sec. 204. (a)(1) There shall be paid to each State an amount equal to one half of the sum of—

(A) the sharable extended compensation, and

(B) the sharable regular compensation, paid to individuals under the State law.

* * *

(4) The amount which, but for this paragraph, would be payable under this subsection to any State in respect of any compensation paid to an individual whose base period wages include wages for services to which section 3306(c)(7) of

the Internal Revenue Code of 1954 applies shall be reduced by an amount which bears the same ratio to the amount which, but for this paragraph, would be payable under this subsection to such State in respect of such compensation as the amount of the base period wages attributable to such services bears to the total amount of the base period wages.

* * *

see 79

1965